

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SANDRA HICKMON, MARCELLA CLOVIS,
Individually and on Behalf of All Other Persons Similarly
Situated,

Plaintiffs,

-against-

FUN & FIT LLC, *doing business as Home Instead Senior Care*, BRIAN TRAINOR, JOHN DOES #1-10,

Defendants.

Case No.:
No. 20-CV-10270-(RA)

**AFFIRMATION OF
TIMOTHY P. COON, ESQ.**

Timothy P. Coon, an attorney duly admitted to practice in the State of New York and before this Court, affirms under penalties of perjury as follows:

1. I am a member of Eckert Seamans Cherin & Mellott, LLC attorney for Defendants Fun & Fit, d/b/a Home Instead Senior Care and Brian Trainor, and as such am fully familiar with the facts and circumstances herein.

2. I submit this affidavit in opposition to Plaintiff's motion for conditional certification of a collection action herein.

3. In support of this motion, Plaintiff submits the affidavit of the two named plaintiffs and a third individual Marlene Whyte. While recognizing that credibility is not generally considered in such a motion, the court must be made aware of numerous intentional inconsistencies, if not falsehoods.

4. Marlene Whyte, who is not a named Plaintiff, worked at Home Instead for three days in early 2017. Despite having worked only three days, she testifies in her affidavit as follows:

- A. Sent me to work as a home health aide/maid for numerous clients
- B. Generally worked more than 40 homes per week

- C. Often worked 24-hour shifts
- D. Never paid me for vacation or holiday pay
- E. Never paid for sick days
- F. Testifies as to similar health aides earnings, hours and working conditions
- G. For many patients she was required to turn the patient every two hours
- H. Refers to a Stanley Mendez, but Home Instead had no such patient
- I. Was not paid for excess of 40 hours per week at overtime rates
- J. Required to do laundry two days per week

5. Marlene Whyte's personnel records are attached to the affidavit of Brian Trainor as Ex. A. These records clearly evidence the misrepresentations of Whyte. Her affidavit contains language strikingly similar, if not identical to, that of Hickman and Clovis, despite her working for only three days at Home Instead.

6. Plaintiff's motion papers do not establish, even in a minimalist fashion, that they were similarly situated. The payroll records and schedules attached to the Trainor affidavit clearly evidence that absence of any similar payroll or work conditions. For example, Plaintiff Hickmon was provided with an aide 8 hours per day on weekdays, Clovis did not request this. Plaintiff Hickmon received a tax free "reimbursement" of \$150.00 per week, Clovis did not. Plaintiff Clovis' daily rate was \$156, while Plaintiff Hickmon's was paid a daily rate of \$160.

7. As attested by Brian Trainor, there is a Plan of Care prepared on an individualized basis for each client that is assigned to oversight by the Home Instead nurse. There is no Plan of Care when the client does not request such oversight. A sample plan of care is attached to the Trainor affidavit as Exhibit F. It is the individualized Plan of Care that determines the duties of each aide depending on the needs of the customer.

8. Defendants submit the following documents, attached to Brian Trainor's affidavit for the Court's consideration:

- A. Pay stub showing holiday pay to Plaintiffs
- B. Whyte payroll records
- C. Hickmon schedule calendar
- D. Clovis schedule calendar
- E. Hickmon paystub with \$150 supplemental payment
- F. Plan of care form
- G. Clovis paystub

Dated: June 17, 2021
White Plains, New York

Respectfully,

/s/ Timothy P. Coon
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